# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## CRIMINAL MISC.APPLICATION No. 2411 of 1995

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE D.H.WAGHELA** Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES; 3 to 5 NO**

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**ABDUL MASJID SHAIKH & 3 - Applicant(s)**
**Versus**
**STATE OF GUJARAT - Respondent(s)**

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**Appearance :**
MR AD SHAH for Applicant(s) : 1,None for Applicant(s) : None for Petitioner No(s).: for Applicant(s) : 2 - 4.
MR SS PATEL ADDL PUBLIC PROSECUTOR for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA**

**Date : 06/12/2006**

**ORAL JUDGMENT**

1. The petitioners, original accused persons, have approached this court under section

482 of the Code of Criminal Procedure, 1973 (for short, "the Code") to challenge the order dated 26.6.1995 of the learned Sessions Judge, Valsad whereby charges were framed against the petitioners for the offences punishable under sections 323, 342 and 306 read with section 114 and, in the alternative under section 302 read with section 114 of the Indian Penal Code, 1860 (for short, "the IPC"), besides the offences under section 3 of the Schedules Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "the Atrocities Act"). After the petition being admitted in July 1995 and grant of ad-interim relief, the ad-interim relief of stay of further proceeding of Sessions Case No.18 of 1992 pending against the petitioners in the court of the learned Sessions Judge, Valsad was directed to continue till further orders. And, the matter has come up for final hearing after eleven years without any addition to the record which consists of only the petition, without any affidavit, and the impugned order.

2. According to the petition, chargesheet had come to be filed in the court of the learned Additional Sessions Judge and it was registered as Atrocity Case No.18 of 1992. Thereafter, the court framed charges for the offences punishable under sections 3(1)(vi), 3(1)(x), 3(1)(xv) of the

Atrocities Act and sections 323, 342, 306 and 506 (1) read with section 114 of the IPC. The prosecution examined 5 witnesses and produced documentary evidence. The medical officer had, on *post mortem* examination, found that the deceased had died due to cardio-respiratory failure due to asphyxia due to hanging. It was not the case of the prosecution that during the examination of the medical officer it was found to be a homicidal death. After the evidence of the prosecution witnesses, statement of the accused was recorded, arguments were heard, written submissions on behalf of the accused were presented and the matter was fixed for judgment. It was thereafter that the learned Sessions Judge framed fresh charges at Ex.50 and added alternative charge of the offence under section 302 of the IPC.

2.1 It is the case of the petitioners that there was no material in the police papers from which even an inference of the alternative charge of the offence of murder could be spelt out. It is submitted that the provisions of section 216 cannot be pressed into service at the time of pronouncement of judgment when the entire evidence was over and statements of the accused were recorded. A further grievance is made that the alternative charge has been added without

affording any opportunity of hearing. Therefore, the exercise of power by the court at the stage of pronouncement of judgment to add alternative charge was unjust, illegal and without any foundation and it was bound to cause prejudice to the accused, according to the submission.

3. Learned counsel Mr.A.D.Shah relied upon the judgment of the Supreme Court in ***State of West Bengal v Laisal Haque [AIR 1989 SC 129]*** in support of the submission that section 218 of the Code embodied the general rule as to the trial of accused persons which provided for separate trial of each accused person for every distinct offence and was based on the fundamental principal of criminal law that accused person must have notice of the charge which he has to meet. Section 221 which is an exception to section 218 was to be applied only when, from the evidence led by the prosecution, it was doubtful which of several offences was committed by the accused person. But there must not be any doubt as to a single act or series of acts which constituted the transaction. The doubt must be as to the inference to be deduced from these facts, but there must not be any doubt as to the facts. He also relied upon the observations of the Supreme Court in ***Lokendra Singh v. State of M.P. [1999 SCC (Cri.) 371*** and in ***Sangaraboina Sreenu v.***

***State of A.P. [1997 SCC (Cri.) 690]*** for the proposition that an offence under section 306 of the IPC was not a minor offence in relation to section 302 of the IPC within the meaning of section 222 of the Code as the two offences were of distinct and different categories.

3.1 Mr.A.D.Shah also relied upon the Division Bench judgment of this court in ***Safimahmad Ibrahim Vora v. State of Gujarat [1993 (2) GLR 1728]*** wherein, in appeal after conviction, and after elaborately discussing the evidence on record, the court observed that, in the circumstances and in view of the stage at which alternative charge was added, it required application of the principle laid down by the Supreme Court in ***Kantilal v. State of Maharashtra [AIR 1970 SC 359]*** and ***in State of West Bengal v. Laisal Haque [AIR 1989 SC 129].*** The court observed that merely because the evidence of solitary eye witness with regard to the facts making up an offence punishable under section 302 of the IPC was found to be not acceptable or believable, there was no legal and valid justification for framing an alternative charge for a new and distinct offence under section 306 of the IPC at the fag end of the trial. Therefore, addition of alternative charge and the conviction and sentence based thereon under

section 306 of the IPC were held to be not legal and proper.

4. The learned A.P.P., in reply, submitted that the impugned order to frame the alternative charge was perfectly legal and properly made in exercise of the power vested in the court under the provisions of section 216 of the Code. After referring to the scheme of the relevant provisions of the Code, he submitted that the petitioners were not prejudiced but benefited by the alteration and the charge being framed before the judgment and there was no legal requirement of granting an opportunity of hearing to the accused persons in such matters. He relied upon the judgment of the Supreme Court in ***Najjam Faraghi v. State Of West Bengal [1998 SCC (Cri.) 506]*** for the proposition contained in para 11 thereof, as under:

> *"11. The mere fact that the case was registered initially under section 306 IPC and later after examination of 9 witnesses an alternative charge under the same section was framed will not vitiate the proceedings or the conclusions of the courts below. There is no doubt that the charge under section 302 IPC has been proved beyond doubt."*

4.1 He also relied upon the recent judgment of the Supreme Court in ***Hasanbhai Valibhai Qureshi v. State of Gujarat [AIR 2004 SC 2078]***

wherein it is clearly observed in para 8 that there is a scope of alteration of the charge during trial on the basis of materials brought on record. Section 216 of the Code appearing in Chapter XVII clearly stipulated that any court may alter or add to any charge at any time before judgment was pronounced. Whenever such alteration or addition was made, the same was to be read out and informed to the accused. It is held in ***Kantilal Chandulal Mehta v. State of Maharashtra [AIR 1970 SC 359]*** that the Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused was not to face a charge for a new offence or was not prejudiced either by keeping him in the dark about the charge or in not giving him a full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred against him. Section 217 deals with recall, if necessary, of witnesses when the charge was altered. Therefore, if during trial the trial court, on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, was satisfied that any addition or alteration of the charge was necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warranted or necessitated.

5. It is observed in ***State of West Bengal v. Laisal Haque*** (supra), after an elaborate discussion of facts and relevant legal provisions, that section 221 of the Code provides by sub-section (1) that if a single act or series of acts was of such a nature that it was doubtful which of several offences the facts which could be proved would constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Sub-section (2) thereof provides that if in such a case the accused was charged with one offence, and it appeared in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he was shown to have committed although he was not charged with it. Next, section 464 of the Code provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal,

confirmation or revision, a failure of justice had, in fact, been occasioned thereby.

6. In view of the rival submissions and the legal position discussed hereinabove, the issues which require consideration are, whether the petitioners were entitled to an opportunity of being heard before effecting the impugned alteration in the charge and whether any failure of justice was occasioned thereby. In absence of any of the material which could have prompted the trial court to alter or add to the charge by the impugned order, it would be hazardous, if not impossible, to hold that there was nothing in the evidence before the court to require alteration of the charge. Even otherwise, it would be improper to re-appreciate the evidence at the stage of trial and interfere with an interlocutory order of the trial court in exercise of the extraordinary jurisdiction of this court under section 482 of the Code. Nothing could be pointed out from the scheme of the Code which would suggest that an opportunity of being heard was envisaged at the stage of framing of charge or at the stage of altering or adding to any charge at any time. Instead, the provisions of section 216 of the Code expressly empowers the court to alter or add to any charge at any time before judgment is pronounced; even as no

opportunity of being heard is envisaged while framing charge under section 228 of the Code. As for the prejudice likely or apprehended to be caused to the accused persons, adequate provisions are made in sub-sections (4) and (5) of section 216 and section 217 of the Code. There is no dispute about the fact that framing of alternative charges is expressly permissible under section 221 of the Code and even conviction for the offences with which the accused was not charged is permissible under the provisions of sub-section (2) of section 221. In that view of the matter, the impugned order of altering the charge appears to have been justified and, in fact, required to give to the parties adequate opportunity of recalling or re-examining the witnesses or calling any other witnesses.

7. In the above view of the matter, there is no reason or justification for setting aside the impugned order of framing alternative charges in exercise of the inherent powers of this court which could be sparingly exercised to prevent abuse of the process of court, or to secure the ends of justice. Therefore, the petition is dismissed, Rule is discharged and interim relief is vacated with no order as to costs. The trial court shall now conclude the proceedings as expeditiously as practicable and deliver the

judgment preferably within six months from receipt of a copy of this order.

8. Learned counsel Mr.A.D.Shah requested for extending the stay of proceedings in the trial court for a period of six weeks. There being no justification for granting the request, it is rejected.

Sd/-

***( D.H.Waghela, J.)***

*(KMG Thilake)*